No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This action was brought by the Administrator of the Office of Price Administration, for injunctive relief and statutory damages under Secton 205(a) and (e), of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U.S.C. App. 925(a), (e)). Jurisdiction of the District Court was invoked under Section 205(c) of the Act; that of this court under 28 U.S.C. sec. 225 (Jud. Code s. 128). The complaint alleged that between December 1, 1943 and May 1, 1944, defendants sold Cuban Rock Lobster at prices in excess of the maximum prices permitted by the General Maximum Price Regulation, as amended (8 F.R. 2096), establishing maximum prices for the sale of such commodities (R. 22, 23).

During pre-trial conferences the parties entered into stipulation setting forth the following facts: The Login Corporation, a California corporation located in San Francisco, California, operates primarily by negotiating sales for others to purchasers secured by Login but at times acts as an importer in its own behalf. Its president is L. P. Gainsborough, Compania Commercial Gainsborough, hereinafter sometimes referred to as the foreign or Cuban seller, is a Cuban exporter. In March 1942, Login had imported lobster from Cuban canners and had established a price ceiling of $13.50 per case under the General Maximum Price Regulation (R. 4). Because of the price rise in Cuba and its own low ceilings, Login discontinued importing lobster although the demand for it was great (R. 4, 5). In October of 1943, Login negotiated sales for a quantity of lobster to be routed from Cuba through San Francisco to Hawaii. It was necessary to ship a full carload to avoid the high "less than carload" rates and 334 cases were needed in addition to the other shipment to make up the carload. Login, who had been under pressure to bring lobster into San Francisco (R. 5), then caused the Cuban seller to ship a full carload, arranging with the Bank of California to issue a letter of credit financing the shipment. This letter of credit was secured by Login and the Cuban seller was notified as to its terms and the terms of shipment of the lobster. The stipulation states that "when the taking of orders was completed" Login issued a confirmation of sale to the Cuban corporation (R. 6). However, Exhibit "E" (a part of the

stipulation) clearly shows that the said statement contained in the body of said stipulation was incorrect, for the following reason: The confirmation, issued on October 7, 1943 (R. 13), recites that Login thereby confirmed a "sale" to "various buyers in San Francisco Bay Area and Hawaii" and asserted that the sale had been confirmed by wire of the same date from the Cuban importer. However, the record shows that as of that date no orders had been placed with Login by San Francisco purchasers. Indeed, it was not until December 1943 that Login took orders for the sale of the 334 cases—and this through a local food broker at $23.50 per case (R. 5).

The issue is, as stated in Appellant's Brief (App. Br. p. 5), whether these sales in December were made by Login as an independent seller—in which case the sales were subject to, and because in excess of its ceilings in violation of, the General Maximum Price Regulation; or were made by Login as selling agent of the foreign seller—in which case they are covered by the Maximum Import Price Regulation (8 F.R. 11681), (R. 14, 15).

At a pre-trial conference the court ruled that on the facts stipulated, Login was not the selling agent of the foreign seller (R. 16), and that the sales in December were subject to the General Maximum Price Regulation. The parties thereupon entered into a further stipulation covering amount of lobster so sold, and that the violations, if any, were neither willful nor the result of the failure of the defendant to take practicable precautions to avoid same (R. 17, 18). No

further questions remaining for submission to the jury, the court entered its order giving judgment to the plaintiff against the appellant for the sum of $3,340.00 (the exact amount of the overcharges) (R. 19). The request for an injunction was refused (R. 25).

On this appeal the appellant urges three grounds for reversal of the judgment below:

(1) That the facts show that Login was a "selling agent" as a matter of law;

(2) That there is no evidence that Login did not act as selling agent in making the sales in question;

(3) That even if Login was not as a matter of law to be held a selling agent, it was a jury question and the court erred in removing this issue from the jury.

The administrator respectfully submits that the judgment is supported by sound conclusions of law based upon proper findings of facts, and that the contentions advanced by the appellant are not well grounded.

ARGUMENT.

I.

THE FACTS SET FORTH IN THE STIPULATION AND THE EXHIBITS CONSTITUTED LOGIN A SELLER AS A MATTER OF LAW AND THE COURT CORRECTLY SO HELD.

The fact that Login called itself "agent" affects its status as buyer, and later as seller, not a whit. The courts will still examine the facts to determine whether a transaction by which goods are shipped by one

party to another for sale by the latter is to be regarded as a consignment for sale—creating the relation of principal and agent between consignor and consignee and resulting in title remaining in the consignor—or one creating the relation of buyer and seller, with the resulting transfer of title to the consignee. Since in a sense all goods are shipped on consignment the answer to the question will depend upon the manner in which the parties act with reference to it: *In re Wells,* 140 F. 752.

If from the whole agreement it is patent that the property is to pass to the person receiving the goods for a price to be paid by him, the transaction is as a matter of law a sale or a contract of sale: *In re Zephyr Mercantile Co.,* 203 F. 576; *Coweta Fertilizer Co. v. Brown,* 163 F. 162; *In re Heckathorn,* 114 F. 499; *In re Wells,* supra. In general, provisions that the consignee shall on receipt of the goods, or at some stated time or times thereafter, pay for all goods received, and that he may sell to whom he will at what price and on what terms he will, are characteristic of a contract of sale, whatever terms may be used in describing it: 6 *C.J.* 1092.

Some agreements call for close scrutiny, due to the inclusion, as here, of some provisions peculiar to contracts of sale and others peculiar to contracts of consignment or agency; and often they seem to have been drawn with a view toward enabling the parties to treat the contract as of either kind: *Banker Bros. Co. v. Pennsylvania,* 222 U.S. 210, 32 S.Ct. 38; *Dr. Miles Medical Co. v. John D. Parks & Sons Co.,* 220 U.S.

373, 31 S.Ct. 376; *Sturm v. Boker,* 150 U.S. 312, 14 S.Ct. 99. But the substance of a contract controls the construction despite any language which might be used: *Greenough v. Willcox,* 238 Mich. 52; *Chezum v. Kreighbaum,* 4 Wash. 680; *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346, 42 S.Ct. 360; *Straus v. Victor Talking Machine Co.,* 243 U.S. 490, 37 S.Ct. 412; *Vermont Marble Co. v. Brow,* 109 Cal. 236; 1 Mechem, Sales, Sec. 46, p. 45; Restatement of Agency, Sec. 1, b. The instrument must be dissected into its component parts, which, under close scrutiny, must reveal true agency. *U. S. v. City and County of San Francisco,* 23 F. Supp. 40.

The record in this case shows that when Login acted as a selling agent it *"accepts orders for submission"* to foreign suppliers (R. 4). But when in October 1943, Login arranged for a shipment of Cuban lobster to Hawaii, because of the high "less than carload" rates then in effect, it felt constrained to bring in from Cuba 334 cases in addition to the Hawaiian shipment (R. 5). The exact chronological sequence is somewhat obscured in the record but it appears from examination that Login ordered the full carload of lobster on October 7, 1943 (Exhibit "E", R. 13), and at that time it had taken *no orders* from customers. This was a radical departure from Login's usual mode of operation in course of which "as sales agent", it "accepts orders for submission to foreign suppliers" (R. 4)—the normal function of seller's agent. In this instance Login issued its "confirmation" reciting a present "sale" to "various buyers",

setting forth all the terms and conditions—price, terms of payment, method of shipment, and quantity.[1] This acknowledgment of "sale" was likewise confirmed by the Cuban seller on the same date. Since Login in fact was not transmitting any orders to the foreign seller but nonetheless purported to have consummated a "sale", and his "principal" purported to have confirmed the same, the issue on this point narrows itself to a discovery of the true legal effect of the transaction.

The shipment, pursuant to the sale, was necessarily in transit before any contracts for sale were negotiated by Login.[2] Not until November 29, does the record show any sale or offer for sale, which was done through E. L. Roberts, a San Francisco food broker (Exhibit "A" R. 11). The memorandum issued at that time by Roberts recited that the sale was "subject to confirmation of seller" before becoming effective. And not until December 2, did Login, still purporting to act as "agent", confirm this sale. This was nearly two months after the Cuban Corporation had divested

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[1]It is to be noted that shipment was to be "F.O.B., C.I.F., F.A.S." San Francisco—stipulations usual in sales contracts and interpreted generally as referring to an executed contract of sale deliverable to the specified delivery point, any title reserved in the consignor being for security purposes only. *Boston Iron etc. Co. v. Rosenthal*, 68 C.A.2d 564, 156 P.2d 963.

[2]This assumption is fairly inferable from the fact that the trust arrangement required drafts to be accompanied "with invoice, consular invoice and entire set of negotiable 'on board' bills of lading made out to the bank" (R. 7), and that "payments were made against the letter of credit on December 7, 13 and 27, 1943" so that by the latter date, the Cuban Corporation had been "paid" in accordance with the terms of said letter of credit (R. 8).

itself of control, had obligated itself to ship the property according to the terms of the agreement of October 7, and apparently had no further rights nor expectations except to be paid. Despite its self-serving declaration of its role, clearly Login was acting in the capacity of buyer and not agent. It is pertinent here to note that the alleged consignment on agency agreement contained no provisions permitting Login to withdraw in the event it had failed to secure purchasers. The liability on Login's part was absolute and leaves no doubt that, in such a contingency, Login would have been contractually bound by the "sale" it asserted in its confirmation.

That the parties themselves were not led astray by formal recitals is doubly clear from the terms of as well as the circumstances surrounding the procurement of the letter of credit. Contemporaneously with the sale of October 7, Login arranged for the financing by the Bank of California (R. 6). This agreement was not made by the bank with Login "as agent", for the record states that "Login recognized the Bank's * * * ownership * * *" etc. (R. 7); the obligations and liabilities secured thereby were Login's not its principal's, nor even Login's in a representative capacity; and upon collection of the amounts of sale, Login repaid the Bank (R. 8).

It has long been recognized in the import trade that activities or the above nature are those of an importer and not of selling agent. Thus, Amendment No. 2 to the Maximum Import Price Regulation of February

29, 1944 (9 F.R. 2350)[3] contained a section specifically aimed at preventing importers from evading the Maximum ceilings through the guise of agency and classes them as independent buyers where they undertake the credit arrangements. The statement of considerations contemporaneously issued with the amendment as required by law[4] explains that this limitation corresponds with interpretations of the term "selling agent" previously made by the Office of Price Administration, and also that the trade considers the de-

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[3]"(b) *Purchases through agents of foreign sellers.* Notwithstanding that a person in the continental United States is considered the selling agent of the foreign seller by the parties to the transaction, he shall not be deemed the selling agent of the foreign seller under this section if he * * * finances the transaction in any manner, or assumes any of the credit risks, or if he determines the selling price. In any such case he shall be deemed to be the importer under this regulation."

[4]*Statement of consideration:* The regulation as originally issued provided that the purchase made by a person through the selling agent of a foreign seller was exempt from price control. The term "selling agent", not having been defined, has been construed by some persons in the trade to include those who sell on a C & F or CIF basis to the importer of record. In many cases the person making the sale was an independent buyer and not the selling agent of the foreign seller.

In order to correct this practice, the regulation has been amended to limit the term "selling agent" to a comparatively narrow class. The amendment specifically removes from the category of "selling agent" anyone who invoices imported commodities in his own name without disclosing that he is acting as agent for a foreign seller, or who finances the transaction in any manner and thus assumes the credit risks, or who determines what the price shall be. These limitations are placed in the amendment for the reasons that they correspond with interpretations in the term "selling agent" previously made by this Office and also because *the trade considers the described functions to be the proper functions of an imported (sic) and not of a mere agent.* Thus any person performing any of these functions is considered the importer under the regulation, even though he is treated as an agent by the parties to the transaction (Pike and Fisher, OPA Service, par. 21, p. 159). (Italics added.)

scribed functions to be the proper functions of an importer or buyer and not of a mere agent.

Without reference to the Amendment however, it is clear that in the transactions of October 7, Login acted as a buyer from the Cuban seller, and that in those of December, it acted as seller. It is elementary that a contract,—including one of sale—requires two contracting parties. In Appellant's Brief (App. Br., p. 11) it is stated that Login's "relationship in law was that of agent to the purchasers, and to its principal, the Cuban Corporation." It seems tautological to comment on the legal impossibility of being agent to purchasers who did not exist. It is equally patent from the record that after the transaction of October 7, no further negotiations were had between Login and the Cuban importer. The conclusion follows irresistibly that there were none further because none were necessary; that the foreign importer had with binding effect "sold" and that Login had with equally binding effect "bought".

As has been stated, circumventions in one guise or another appear often where certain business practices have been drawn with a view to enabling the parties to "run with the hare" or "hold with the hounds" according, as in the exigencies of a given case, their interests may dictate: *Ferry v. Hall,* 188 Ala. 178. But they cannot make a sale and at the same time constitute the buyer simply an agent of the seller to hold the property until some further act is accomplished: *Ferry v. Hall,* supra. No matter how such contract

may be styled, the arrangement does not suffice to remove the controls imposed by public policy.

The courts have on numerous occasions enforced the rule that the particular form in which the parties have cast a transaction will not prevail when, but for that form, it is subject to the condemnation, regulation, or other application of a statute or declared public policy: *Taylor v. United States,* 142 F.2d 808, (C.C.A., 9th) cert. den. 323 U.S. 813; *United States v. City and County of San Francisco,* 310 U.S. 16, 60 S.Ct. 749; *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17, 54 S.Ct. 767; *Superior Oil Co. v. Mississippi,* 280 U.S. 390, 50 S.Ct. 169; *Strauss v. Victor Talking Machine Co.,* supra. The courts look beyond mere names and within to see the real nature of the agreement and determine its legal character and effect from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision: *Standard Fashion Co. v. Magrane-Houston Co.,* supra; *Banker Bros. v. Pennsylvanit,* supra. They will not permit the parties, by designating the transaction as a consignment for sale, to use it as a cloak or device to disguise the real character of the transaction: *Chickering v. Bastress,* 130 Ill. 206; *McGaw v. Hanway,* 120 Md. 197. Particularly is this true where the arrangement, if allowed, would have the effect of subverting an important public policy, solemnly declared by the legislature and requiring incessant vigilance by those charged with its operation. Thus in *U. S. v. Masonite Corp.,* 316 U.S. 265, 62 S.Ct. 1070, a prosecution under the

Sherman Act, the court stated that a so-called del credere "agency" did not "necessarily control when the rights of others intervene, whether they be creditors or sovereign" and held that "the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade" (62 S.Ct. 1078).

Similarly, in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.,* supra, the contention was that certain agreements were "Retail Agency Contracts" of consignment for sale and not outright sales. The lower court, quoted with approval in the opinion by Mr. Justice Hughes (31 S.Ct. 380), rejected this contention and held it "an effort to 'disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the "cut rate" business might be regarded as valid,' and that under this agreement 'the general jobber must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of another." The same reasoning was followed by the court in *Banker Bros. v. Pennsylvania,* supra, upholding the validity of the imposition of a state sales tax levied upon a consignment transaction claimed to be merely an agency.

The rule has been followed in cases dealing with the Emergency Price Control Act, where other devices have been brushed aside. In *U. S. v. Weiss,* 150 F.2d 17 (cert. den. 65 S.Ct. 45), the contention was that the defendant was only a "finder" and not a seller.

The court held him a seller and affirmed his conviction. In *Taylor v. U. S.,* supra, the court looked through the converse situation where the claim was of a sale. In *U. S. v. Steiner,* 152 F.2d 484, the court held that a purported lease was (152 F.2d 487):

> "* * * Simply a vehicle for the circumvention of the law and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price * * *"

In *Schreffler v. Bowles* (C.C.A., 10) January 12, 1946, (not yet reported), the appellants defended a treble damage action on the ground that they were not engaged in purchase and sale "but were merely acting as the servants of the various concerns with whom they were dealing." Rejecting this contention, the court held that examination of the facts "exhibits a clear intent to evade the maximum price regulation by way of 'commission, service, or otherwise.' The gravamen is the evasion of a price limitation by direct or indirect methods, and this the parties may not do."

The broad objectives of the Emergency Price Control Act aimed at avoidance of the inflationary spirals are expressed as commandingly in the regulations dealing with lobster as in those dealing with other facets of the national economy. The perils foreseen by Congress define the scope of the administrative regulation and conduct enjoined. One may act as an importer under his own ceiling; or he may legitimately act as selling agent for a foreign importer. He may not however buy in the foreign market and later sell at prices in excess of his own ceilings through the

medium of formally inserting "as agents" in his subsequent sales contracts. To permit such to be done would inevitably result in complete nullification of what was by Congress deemed an important part of the price structure.

The fact that Login's profit from these sales amounted to but a percentage commission is immaterial. Its retention or regaining of a competitive advantage over other importers who were limited by their ceilings; the advantages accruing to it directly as well as the intangibles of good will or other inducements deemed important by it and not necessary to be explored herein, sufficiently dispose of that issue. Moreover, it needs hardly to be suggested that the operation of price ceilings in no wise depends upon the amount of profit secured by their violation.

II.

THE STIPULATED FACTS HEREIN PRESENTED A QUESTION OF LAW FOR THE COURT, AND NOT ONE OF FACT FOR THE JURY.

The purpose of federal pre-trial procedure is to facilitate trial by elimination of issues not really in dispute. Under Rule 16 the court properly issues an order reciting the issues left for trial. The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, and the resolution of this question was for the court, not the jury. Federal Rule 16 establishes a mechanism for summary

determination of whether any conflicts of fact remain for submission to a jury. In so doing the court does not, as Appellant mistakenly insists in its brief, deprive the parties of their right to jury trial guaranteed by Article VII of the Constitution. The court is not passing on weight, credibility, or sufficiency, but on the legal significance of admitted evidence. It is the sole province and function of the trial court, and not of the jury, to determine the legal effect of undisputed evidence: 64 *C.J.* 341.

Questions whether facts do or do not constitute a sale, and who is bound by an instrument are for the court and not the jury: *Gohen v. Kehoe,* 71 Ill. 66; *Kendall Boot etc. Co. v. Bain*, 46 Mo. App. 581; *Thomas v. Presbrey*, 5 App. (D.C.) 217; 64 *C.J.* 336. "The existence of agency may often be a question of fact requiring submission to the jury; not so when the contract is in writing and there is no dispute or room for disputed inference as to the other documents, correspondence, and acts which might sometimes bear upon construction." *Texas Co. v. Rice,* C.C.A. 6, 26 F.2d 164, cert. den. 278 U.S. 640, 49 S.Ct. 34. Where there is no dispute as to the facts, the construction of a contract of sale to determine the rights and obligations secured thereunder are for the court and not the jury: *Colonial Ice Cream Co. v. Interocean Mercantile Corp.,* 296 F. 316.

The facts as to Login's activities in connection with the ordering of lobster and its subsequent transfer to buyers in San Francisco being admitted, the court would have been required to submit the cause to a

jury under binding instructions and to have set aside a verdict in favor of the defendant. It is said in *Slocum v. New York Life Insurance Co.,* 228 U.S. 364, 33 S.Ct. 523:

> "When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party."

Since, as said above, the law is settled that one cannot be both agent to sell and an independent buyer in the same transaction, the question is not whether Login in fact purported to act for the Cuban importer but the qualitative effect of its acts in law. That was the preliminary question for the court to consider and which was properly determined. The decisions establish the reasonable rule that:

> "* * * in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Improvement Co. v. Munson,* 14 Wall. 442; *Pleasants v. Fant,* 22 Wall. 116; *Gunning v. Cooley,* 281 U.S. 231, 50 S.Ct. 231.

CONCLUSON.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Dated, San Francisco, California,
March 27, 1946.

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